



2014

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Recommended Citation

Cheryl Nelson Butler, *Making the Grade: The U.S. TIP Report & the Fight against Domestic Child Sex Trafficking*, 67 SMU L. Rev. 341 (2014)

<https://scholar.smu.edu/smulr/vol67/iss2/6>

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MAKING THE GRADE: THE U.S. TIP REPORT & THE FIGHT AGAINST DOMESTIC CHILD SEX TRAFFICKING

Cheryl Nelson Butler*

I. INTRODUCTION

THE war against human trafficking has become a major focus of United States foreign policy.¹ The U.S. Department of State's annual Trafficking in Persons Report ("TIP Report") functions as one of America's most important weapons in this fight.² However, few legal scholars have analyzed the impact of the TIP Report on international or domestic anti-trafficking policy.³ To begin to fill this gap, this

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1. MARIA OTERO, U.S. DEP'T OF STATE, 2010 TIP Report, Remarks at the Rollout of the 2010 Trafficking in Persons Report (TIP) (June 24, 2010) (discussing human trafficking as an issue that is "critical to U.S. foreign policy").

2. *The State Department 2013 Trafficking in Persons Report: Hearing Before the Subcomm. on Afr., Global Health, Global Human Rights, & Int'l Orgs. of the H. Comm. on Foreign Affairs*, 113th Cong. (2013) [hereinafter *2013 Hearing*] (statement of Rep. Chris Smith, Chairman of the House Subcomm. On Global Human Rights) ("When I wrote the law—the Trafficking Victims Protection Act of 2000—that created not only this [Trafficking in Persons] report, but also the Office to Monitor and Combat Trafficking in Persons in the U.S. Department of State . . . it was hoped this report would become the international gold standard and primary means of anti-trafficking accountability around the world. It has."); John F. Kerry, *Introduction* to U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REP.* 3 (2013) ("[T]his annual Report is the gold standard in assessing how well governments—including our own—are meeting that responsibility [to combat trafficking].") [hereinafter 2013 TIP REP.]; Hillary Rodham Clinton, *Introduction* to U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REP.* 1 (2010) ("Ending this global scourge is an important policy priority for the United States.") [hereinafter 2010 TIP REP.]; WYLER CONG. RESEARCH SERV., *TRAFFICKING IN PERSONS: INTERNATIONAL DIMENSION AND FOREIGN POLICY ISSUES FOR CONGRESS* (2013).

3. For an analysis of the TIP Report since its inclusion of the U.S. Country Narrative in 2010, see Ashley Feasley, *Time for a Tune-Up: Retooling the 2012 TIP Report in Order to Better Meet International Legal Research Standards*, 25 FLA. J. INT'L L. 5 (2013); Salvador A. Cicero-Dominguez, *Lessons from the Road: Ecuador, Jamaica, and Other Efforts to Combat Trafficking in Persons in the Americas*, 31 N. ILL. U. L. REV. 521 (2011); Nathan Godsey, *The Next Step: Why Non-Governmental Organizations Must Take a Growing Role in the New Global Anti-Trafficking Framework*, 8 REGENT J. INT'L L. 27 (2011).

For law review articles that analyze the TIP Report in varying degrees prior to 2010, see generally Mindy M. Willman, *Human Trafficking in Asia: Increasing Individual and State Accountability through Expanded Victim's Rights*, 22 COLUM. J. ASIAN L. REV. 283 (2008–2009); Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 474–88 (2006); Mohamed Mattar,

article explores the TIP Report through the lens of domestic child sex trafficking. In particular, this article investigates whether the United States TIP Report serves as an effective tool for encouraging domestic compliance with its standards and otherwise shaping domestic child sex trafficking law and policy.

Since 2001, the federal Trafficking Victims Protection Act ("TVPA") and its reauthorizations have directed the U.S. Department of State to evaluate the anti-trafficking laws and policies of countries throughout the world and publish its findings in the annual TIP Report.⁴ As part of its evaluation, the Department of State ranks several country's anti-trafficking laws and policies based on the degree of compliance with certain minimum standards, known as "the 4Ps."⁵ Under the TIP Report's 4P framework, effective anti-trafficking laws are those that (1) protect victims; (2) prosecute traffickers; (3) prevent future harms; and (4) utilize community partnerships to combat trafficking.⁶ The TIP Report's rankings system has functioned as a powerful diplomatic tool to compel foreign countries to either improve their anti-trafficking efforts or face international shame, critique, and even sanctions.⁷

In 2010, the Obama administration broke new ground by revising the TIP Report to include for the first time a TIP report card for the United States (formally called the "United States Country Narrative"), a self-

Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later, 19 AM. U. J. GENDER SOC. POL'Y & L. 1247, 1355 (2011); David M. Smolin, *Child Laundering as Exploitation: Applying Anti-Trafficking Norms to Inter-country Adoption Under the Coming Hague Regime*, 32 VT. L. REV. 1 (2007); Susan W. Tiefenbrun, *Sex Slavery in the United States and the Law Enacted to Stop It Here and Abroad*, 11 WM. & MARY J. WOMEN & L. 317 (2005) (discussing the organization and legal framework used in early TIP Reports); Ayla Weiss, Comment, *Ten Years of Fighting Trafficking: Critiquing the Trafficking in Persons Report Through the Case of South Korea*, 13 ASIAN-PAC. L. & POL'Y J. 304 (2012) (critiquing the TIP Report's analysis of anti-trafficking efforts in South Korea); Melissa Holman, Comment, *The Modern-Day Slave Trade: How the United States Should Alter the Victims of Trafficking and Violence Protection Act in Order to Combat International Sex Trafficking More Effectively*, 44 TEX. INT'L L.J. 99 (2008) (discussing the early successes of the TIP Report in deterring human trafficking).

4. 22 U.S.C. § 7107(b) (2012); see Colin Powell, U.S. Sec'y of State, Remarks at the Special Briefing on the Release of the 2001 Trafficking in Persons Report (July 12, 2001), available at <http://2001-2009.state.gov/g/tip/rls/rm/2001/4071.html> ("I am here today to announce the release of the Department of State's first Annual Trafficking in Persons Report, a report mandated by congress under Public Law 106-386, titled Victims of Trafficking and Violence Protection Act of the year 2000."); U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REP. (2001), available at <http://www.state.gov/j/tip/rls/tiprpt/2001/index.htm>; 2013 TIP REP., *supra* note 2.

5. 2013 TIP REP., *supra* note 2, at 371.

6. *Id.*

7. *The Trafficking in Persons Report 2011: Truth, Trends, and Tier Rankings: Hearing Before the S. Comm. On Africa Global Health*, 112th Cong. 14-15 (2011) (statement of Hon. Robert O. Blake, Assistant Secretary of State, Bureau of South and Central Asian Affairs) (explaining that, in Asia, "the trafficking report has been an impetus for change in all of [the] region"); Chuang, *supra* note 3, at 439 (arguing that through the TVPA's sanctions regime, "the United States has proclaimed itself global sheriff on trafficking," which "raises grave concerns both as a matter of international law and as a matter of anti-trafficking strategy"); Willman, *supra* note 3, at 286 ("Failure to meet the United States' standards opens a state up to public reprimand or monetary sanctions.").

assessment of the United States' own efforts to combat human trafficking at home.⁸ In each U.S. TIP Report Card published since 2010, the United States has earned a Tier 1 ranking, the best possible grade awarded in the TIP Report.⁹ The Department of State has promised to use the self-assessment as a tool for holding the United States' anti-trafficking laws and policies to the same standards it demands of its foreign counterparts.¹⁰ As a result, the United States has promised to increase its efforts to fight human trafficking within its own borders.¹¹

This major revision of the TIP Report challenges the United States to strengthen its role in combating not only international but also domestic anti-trafficking policy. Indeed, the addition of the U.S. Country Narrative raises several questions. Do American laws and policies comply with the 4P standards to which the United States holds other countries? Do U.S. anti-trafficking efforts merit a Tier 1 ranking? Has the TIP Report impacted the fight against human trafficking in the United States?

To answer these questions, this article explores the TIP Report generally, as well as the U.S. Country Narrative in particular, through the lens of domestic child sex trafficking. The link between the TIP Report's U.S. self-assessment and the issue of domestic child sex trafficking is important. The trafficking of children within United States borders is a national "epidemic."¹² This strong market for commercial sex is fueled by enormous financial profits and relatively weak criminal penalties.¹³ Thus, the Department of State's discussion of child sex trafficking in the TIP Report sheds important light on the U.S. government's commitment to addressing human trafficking.

Domestic child sex trafficking is an issue that for too long has been marginalized in the discourse on human trafficking generally and anti-trafficking foreign policy in particular.¹⁴ Yet, minors comprise a large percentage of sexually exploited persons in the United States.¹⁵ Each year,

8. Ortero, *supra* note 1 ("And this year, the Report ranks the United States for the first time ever, holding itself to the same standards to which it holds others."); see 2010 TIP REP., *supra* note 2, at 388.

9. See 2013 TIP REP., *supra* note 2, at 381; U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REP., 359 (2012) [hereinafter 2012 TIP REP.]; U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REP., 372 (2011) [hereinafter 2011 TIP REP.]; 2010 TIP REP., *supra* note 5, at 338.

10. HILLARY CLINTON, 2010 TIP REP. ("The Report, for the first time, includes a ranking of the United States based on the same standards to which we hold other countries.").

11. *Id.*

12. Mary Catherine Hendrix, Note, *Enforcing the U.S. Trafficking Victims Protection Act in Emerging Markets: The Challenge of Affecting change in India and China*, 43 CORNELL INT'L L.J. 173, 176-77 (2010).

13. Shelly George, *The Strong Arm of the Law is Weak: How the Trafficking Victims Protection Act Fails to Assist Effectively Victims of the Sex Trade*, 45 CREIGHTON L. REV. 563, 564-66, 572 (2012).

14. Tiefenbrun, *supra* note 3, at 318-19.

15. Cheryl Nelson Butler, *Kids for Sale: Does America Recognize Her Own Sexually Exploited Minors as Victims of Human Trafficking?*, 44 SETON HALL LAW REVIEW (forthcoming 2014); Jonathan Todres, *A Child Rights Framework for Addressing Trafficking of Children*, 22 MICH. ST. INT'L L. REV. 557, 561 (2014) (critiquing anti-trafficking strategies

an estimated 100,000 to 300,000 domestic minors are victims of sex trafficking and commercial sexual exploitation in the United States.¹⁶

To address the issue on the federal level, Congress enacted the TVPA, reauthorized through the Trafficking Victims Protection Reauthorization Act (TVPRA).¹⁷ The TVPRA classifies all prostituted minors as “victims of human trafficking” without exception.¹⁸ However, several state laws do not follow the TVPRA’s definition of child sex trafficking. Instead, states have adopted laws and policies that conflict with federal policy of treating prostituted minors as crime victims instead of criminals. For example, some state laws limit their statutory definition of trafficking victim to those cases in which force, fraud, or coercion is proven.¹⁹

This article argues that the TIP Report has had a moderate impact on United States’ efforts to address child sex trafficking, but efforts toward more effective compliance are increasing. On the one hand, the TIP Report has yet to persuade the United States to develop an effective uniform legal response to its epidemic of child sex trafficking. On the other hand, recent federal initiatives suggest that the United States is strengthening its efforts to comply TIP standards to address the issue of child sex trafficking. This article further argues that the United States’ inconsistent legal responses to child sex trafficking undermine the United States’ compliance with the TIP Report’s 4P standards. On the one hand, the Obama administration has taken further steps to combat human trafficking on both the federal and state level, including supporting the passage of the TVPRA in 2013.²⁰ On the other hand, state child sex trafficking laws do not consistently meet the TIP Report’s 4P standards. Two particular policies are problematic. First, state laws that require proof of force, fraud, or coercion in child sex trafficking cases contravene the Department of State’s minimum standards for effective anti-trafficking laws. Second, state laws that allow prostituted minors to be treated as criminals rather than crime victims contravene the TIP’s minimum standards. The Depart-

that focus on prosecution instead of protecting survivors or preventing future abuses); INST. OF MED. & NAT’L RESEARCH COUNCIL, *CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES* (2013); Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL’Y REV. 1, 3–4 (2011) (arguing for the need for state legislation that promotes recovery for prostituted minors and provides rehabilitative services instead of criminal prosecution or delinquency adjudication).

16. LINDA A. SMITH ET AL., *SHARED HOPE INT’L, THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA’S PROSTITUTED CHILDREN* (2009).

17. 22 U.S.C. §§ 7101–07 (2012).

18. SMITH ET AL., *supra* note 16, at 7, 52.

19. NICOLE HAY, *SHARED HOPE INT’L, DOMESTIC MINOR SEX TRAFFICKING: DALLAS ASSESSMENT 6* (2008) available at <http://sharedhope.org/wp-content/uploads-2012/2/09/DallasPrinterFriendly2.pdf> [hereinafter *Shared Hope Int’l Dallas Assessment*].

20. Trafficking Victims Protection Reauthorization Act, Pub. L. No. 113-4, 127 Stat. 54. In addition, from 2013 to 2014, the 113th Congress introduced several anti-trafficking bills, including HR 906, SB413, the Human Trafficking Reporting Act, and S121, a bill to establish the United States Advisory Council on Human Trafficking to review federal government and policy on human trafficking. See S. 121, 113th Cong. (2013).

ment of State must develop new strategies to compel state and local governments to fully comply with the TIP standards at home.

Part I introduces the issue of child sex trafficking and considers whether the United States' legal response to this issue complies with the TIP Report's 4P legal standards. Part II explores the TIP Report and its role in combating human trafficking on both an international and domestic level. Part II provides a roadmap of the TIP Report and analyzes its role in setting forth the international and federal laws that govern the report itself. Part II also explores the "4P" legal paradigm that drives the TIP Report's system of ranking countries' anti-trafficking laws.

Part III examines the issue of child sex trafficking in the TIP Report generally and in the U.S. Country Narrative in particular. Part III assesses whether the U.S. Narrative accurately portrays the U.S. fight against child sex trafficking.

Part IV explores several ways in which the United States' effort to address child sex trafficking falls short of the TIP Report's 4P standards. First, U.S. state and local laws do not follow with the federal and international definitions of child sex trafficking upon which the TIP reports rely. Secondly, state and federal laws do not consistently treat child prostitutes as crime victims instead of criminals.

Part V considers the ways in which the United States has made great strides to address this epidemic. Part V explores new initiatives that aim to fill gaps between the federal and state response to child sex trafficking and bring the United States approach to child sex trafficking in better alignment with the TIP Report's 4P minimum standards.

II. THE U.S. TRAFFICKING IN PERSONS REPORT

A. KEY COMPONENTS

This Part analyzes the TIP Report's role in policing the world's anti-trafficking laws and policies. Each year, the Department of State publishes its annual TIP Report to measure the international community's compliance with certain minimum standards for anti-trafficking laws and policies set forth in the report.²¹ Since 2010, the TIP Reports have included several comprehensive sections that shed light on the international war on human trafficking. Each report includes introductory remarks from U.S. leaders focused on this war, including the Secretary of State and the U.S. TIP Ambassador.²² The reports contain sections focused on the "policy priorities" and "topics of special interest" related to trafficking which the Department of State advocates that the international community help address.²³ The reports also personalize the fight against trafficking by including sections dedicated to "victim stories" and "hero"

21. See, e.g., 2013 TIP REP., *supra* note 2, at 41–47, 55.

22. See, e.g., *id.*

23. See, e.g., *id.*

advocates.²⁴ Each report also includes a section on TIP law, *i.e.*, the minimum legal standards upon which the TIP Report and its ranking system are built.²⁵

Several of these sections attempt to “put a face on human trafficking” by graphically depicting the facts, schemes, victims, and villains involved in trafficking cases around the world. Recent TIP Reports are replete with graphic photos of actual victims of human trafficking, including minors who have been exploited for commercial sex.²⁶ The TIP Reports also feature poignant victim stories that humanize the plight of real trafficking victims.²⁷ The latest trafficking reports have framed the issue of “the face of human trafficking” as a larger theme, representing the challenges of enacting anti-trafficking laws and policies that promote proper victim identification.²⁸

The heart of the TIP Report is its tier rankings. Each TIP Report sets forth the TIP standards and explains how the standards are used to rank countries.²⁹ The TIP Report provides a chart in which the ranking assigned to each country is listed. In addition to the rankings themselves, the TIP Report includes “country narratives,” in which the factors used to determine the country’s rankings including the country’s anti-trafficking laws and policies, are analyzed.³⁰

B. GOVERNING LAW & MINIMUM STANDARDS

A review of the standards and the legal authorities applied by the Department of State in its TIP reports is central to an analysis of the report’s effectiveness. To measure the anti-trafficking efforts of countries throughout the world, the TIP Report derives its legal standards from two main sources: the federal TVPA, reauthorized by the TVPRA,³¹ and the United Nations Convention against Transnational Organized Crime and its Supplementary Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (U.N. Protocol).³²

24. See, *e.g.*, *id.*

25. See, *e.g.*, *id.*

26. See, *e.g.*, *id.*

27. See, *e.g.*, 2011 TIP REP., *supra* note 9, at 6 (“The victims’ testimonies . . . show the myriad forms of exploitation that define trafficking and the variety of cultures in which trafficking victims are found.”)

28. See, *e.g.*, 2013 TIP REP., *supra* note 2, at 29–30.

29. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-825, HUMAN TRAFFICKING: BETTER DATA, STRATEGY, AND REPORTING NEEDED TO ENHANCE U.S. ANTI-TRAFFICKING EFFORTS ABROAD 31–32 (2006); see also 2013 TIP REP., *supra* note 2, at 64 (explaining how to read a TIP Report Country Narrative); 2011 TIP REP., *supra* note 9, at 11, 13–14, 16–17, 30–32, 40–55 (discussing the tiers and the 4Ps).

30. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 30, at 31–32.

31. 22 U.S.C. §§ 7101–07 (2012).

32. MOHAMED MATTAR, UNITED NATIONS, LEGAL APPROACHES TO TRAFFICKING AS A FORM OF VIOLENCE AGAINST WOMEN: IMPLICATIONS FOR A MORE COMPREHENSIVE STRATEGY IN LEGISLATION ON THE ELIMINATION OF VIOLENCE AGAINST WOMEN 2, 6 (2008).

To combat human trafficking crimes abroad and at home, the United States enacted the TVPA in 2000 and reauthorized this federal legislation as the TVPRA in 2004, 2006, 2008, and, most recently, in 2013 (collectively referred to hereinafter as the TVPRA).³³ The TVPRA is the most comprehensive trafficking law passed by Congress.³⁴ The legislation criminalizes “severe forms of trafficking in persons,” including all forms of child sex trafficking and the sex trafficking of adults through force, fraud, or coercion.³⁵ The TVPRA authorizes the publication of the TIP Report. The TVPRA requires that the President of the United States create a bureau within the Department of State to address trafficking on the federal and state levels,³⁶ the Bureau to Combat and Monitor Trafficking in Persons, which prepares the annual TIP Report.³⁷

In addition to the TVPRA, the TIP Report also derives legal authority from the United Nations Convention against Transnational Organized Crime and the U.N. Protocol.³⁸ While the TVPRA and the U.N. Protocol provide express legal authority for the TIP Report, the Department of State has also invoked the 13th Amendment as inspiration and, arguably, persuasive legal authority for its commitment to combating modern slavery.³⁹ Marking the 10th anniversary of the TIP Report, Ambassador CdeBaca wrote that the report protected “the promise of freedom that Abraham Lincoln made almost 150 years ago.”⁴⁰

From the TVPRA and the U.N. Protocol, the Department of State derives the legal framework applied in the TIP Report to evaluate anti-trafficking laws and policies.⁴¹ These standards consist of a legal paradigm known as the “4Ps,” used to evaluate whether nations’ anti-trafficking efforts comply with this legislation.⁴² The 4Ps represent the major self-proclaimed goals of the TVPRA of 2000: “to punish traffickers, pro-

33. 22 U.S.C. §§ 7101–07 (2012).

34. Susan Tiefenbrun, *The Cultural, Political, and Legal Climate Behind the Fight to Stop Trafficking in Women: William J. Clinton’s Legacy to Women’s Rights*, 12 CARDOZO J.L. & GENDER 855, 876–77 (2006). In addition to the TVPA, the United States has enacted other legislation to address human trafficking. This includes the Mann Act, 18 U.S.C. §§ 2421–24 (2012); the Child Soldiers Prevention Act of 2008, Pub. L. No. 110-457, §§ 401–07, 122 Stat. 5044 (2012); and the National Defense Reauthorization Act, Pub. L. No. 112-239, 126 Stat. 1632 (2012). For a list of other federal and international laws addressing human trafficking generally, see Wyler, *supra* note 2, 6–7.

35. 22 U.S.C. §§ 7102(8)–(9) (2012); U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REP. 6 (2009) [hereinafter 2009 TIP REP.].

36. Wyler, *supra* note 2, at 65.

37. 22 U.S.C. § 7107(b)(1) (2012). The TVPRA of 2013 amended the TVPA of 2000 to rename the Department of State’s Office to Monitor and Combat Trafficking as the Bureau to Monitor and Combat Trafficking. For a discussion of the roles these play in the fight against human trafficking, see Wyler, *supra* note 2, 4–10.

38. MATTAR, *supra* note 33, at 6.

39. See Luis CdeBaca, Ambassador-at-Large, Office to Monitor and Combat Trafficking in Persons, *Introduction to 2010 TIP REPORT*. The TIP Reports are replete with additional references to the 13th Amendment.

40. *See id.*

41. 22 U.S.C. 7107(b)(1) (2012); 2011 TIP REP., *supra* note 9, at 11 (“The [country] analyses are based on the extent of governments’ efforts to reach compliance with the TVPA’s minimum standards for the elimination of human trafficking.”).

42. 2010 TIP REP., *supra* note 2.

tect victims, and to prevent trafficking from occurring.”⁴³ The Department of State added a fourth P, partnerships, as an additional standard in 2010.⁴⁴ Like the TVPRA, the U.N. Protocol also adopts a similar framework.⁴⁵ Specifically, the U.N. Protocol called for the adoption of measures that focused on a ‘3P’ paradigm: prosecuting traffickers, protecting victims, and preventing future crimes.⁴⁶

C. THE TIER RANKINGS

To measure whether nations enact laws that meet each of these 4P standards, the Department of State ranks countries by tiers—Tier 1,⁴⁷ Tier 2,⁴⁸ Tier 2 Watch List, and Tier 3⁴⁹ (the lowest and worst ranking)—and publishes the rankings in the annual TIP Report.⁵⁰ The Department of State has asserted that the Tier 1 ranking is reserved for countries who have adopted anti-trafficking laws and policies that meet all of the 4P minimum standards.⁵¹ To receive or maintain Tier 1 status, a country must show that its government has made “appreciable progress” in addressing human trafficking within or from its country.⁵² In other words, “a Tier 1 ranking indicates that a government has acknowledged the existence of human trafficking [and] has made efforts to address the problem.”⁵³ The TIP Report includes both general suggestions on how all countries can achieve Tier 1 status and specific recommendations on the steps that each evaluated country should take to improve its anti-trafficking efforts.⁵⁴

Countries that fail to comply with the minimum standards fall into one of several lower rankings. Tier 2 countries are those that have failed to fully comply with the minimum standard but have taken significant steps

43. 2009 TIP REP., *supra* note 36, at 5.

44. Clinton, *supra* note 2.

45. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, pmbl., art. 5–13, *opened for signature* Dec. 12, 2000, T.I.A.S. No. 13127 (entered into force Dec. 25, 2003) [hereinafter U.N. Protocol].

46. Article 5 of the Protocol requires that states enact legislation that criminalizes trafficking; Article 6 and 7 mandate provisions that ensure the protection of trafficking victims by the state. *Id.* art. 5. Article 9 requires legislative action to prevent future trafficking crimes. *Id.* art. 9; *see also* 2011 TIP REP., *supra* note 9, at 16 (discussing the applicable articles of the U.N. Protocol from which the 4Ps are derived).

47. Countries who have achieved Tier 1 status include the United States of America, Australia, Belgium, Denmark, Italy, Spain, and the United Kingdom. 2013 TIP REPORT, *supra* note 2, at 41; Wyler, *supra* note 2, at 21.

48. Countries designated as Tier 2 include Antigua and Barbuda, Aruba, Cape Verde, Chile, El Salvador, and Uganda. 2013 TIP REP., *supra* note 2, at 41; Wyler, *supra* note 2, at 21.

49. Several countries have been designated as Tier 3: Cuba, Eritrea, North Korea, and Sudan. 2013 TIP REPORT, *supra* note 2, at 41; Wyler, *supra* note 2, at 21.

50. 2011 TIP REP., *supra* note 9, at 11, 13, 14, 404.

51. *Id.* at 11.

52. *Id.*

53. *Id.*

54. *See, e.g., id.* at 4; 2013 TIP REP., *supra* note 2, at 36 (suggesting “Potential Achievements of an Intragovernmental Anti-Trafficking Body”).

toward full compliance.⁵⁵ The TVPRA of 2003 also authorized a Tier 2 Watch List.⁵⁶ The Watch List is comprised of countries that barely meet Tier 2 criteria but nevertheless are scrutinized by the Department of State for continued compliance.⁵⁷ The Watch List “allow[s] countries an opportunity to address serious shortcomings in their anti-trafficking efforts before being placed in Tier III and subject to sanctions.”⁵⁸ Countries that remain on the Watch List for two consecutive years without significant improvements can be subjected to an “automatic downgrade” to Tier 3.⁵⁹ As a result of concerns about the integrity of the tier rankings, 2013 marked the first year that certain countries could no longer receive waivers to avoid the automatic downgrade.⁶⁰

III. THE TIP REPORT’S ROLE IN COMBATING CHILD SEX TRAFFICKING

A. SHAPING INTERNATIONAL & DOMESTIC LAW

The TIP reports reflect the Department of State’s continued concerns about child sex trafficking and its impact on U.S. foreign and domestic policy.⁶¹ The TIP Report calls upon countries to follow the legal definitions of child sex trafficking under the U.N. Protocol and TVPRA.⁶² It emphasizes that the TVPRA defines sex trafficking in terms of force, fraud, or coercion (“FFC”) in cases involving adults but not minors.⁶³ The U.N. Protocol does not require that prosecutors rebut a presumption of consent in order to prove child sex trafficking.⁶⁴ A person violates the TVPRA if that person “recruits, entices, harbors, transports, provides or

55. 2011 TIP REP., *supra* note 9, at 13; Susan W. Tiefenbrun, *Updating the Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 38 CASE W. RES. J. INT’L L. 249, 269–70 (2005) (citing U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REP. 15 (2005)).

56. 2013 Hearing, *supra* note 2, at 2 (statement of Hon. Christopher H. Smith, Chairman, Subcomm. on Afr., Global Health, Global Human Rights, & Int’l Orgs.).

57. *Id.*

58. *Id.*

59. *See id.*; 2011 TIP REP., *supra* note 9, at 14.

60. 2011 Hearing, *supra* note 7, at 9 (statement of Hon. Luis CdeBaca, Ambassador-at-Large, Office to Monitor and Combat Trafficking in Persons) (“Sex Trafficking of women and girls has not abated and may, in fact, be increasing in places such as India.”).

61. *Id.*

62. *See, e.g., id.* at 7.

63. *See* 22 U.S.C. § 7102(8)(A) (2012). The TVPRA specifically identifies “severe forms of trafficking,” *i.e.*, those cases in which (1) a person uses force, fraud or coercion to traffic an adult; or (2) a person engages in a commercial sex act with a minor. 22 U.S.C. § 7102(9)(a) (2012); *see also* 18 U.S.C. § 1591(a) (2012) (“whoever knowingly—(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, or obtains by any means a person; or (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing that force, fraud, or coercion described in subsection (c)(2) will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of eighteen years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).” (emphasis added)).

64. U.N. Protocol, *supra* note 46, art. 3, para. (b) (“The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) . . . shall be irrele-

obtains *by any means*” a minor for the purposes of a commercial sexual act.⁶⁵ The TIP Report confirms that the TVPRA recognizes psychological coercion as meeting the standard.⁶⁶ The U.N. Protocol does not require proof of force, fraud, or coercion to define child trafficking.⁶⁷

The TIP Report also affirms the U.N. Protocol’s definitions of child sex trafficking.⁶⁸ The U.N. Protocol provides a broad definition of child sex trafficking that reflects the myriad of means used to engage minors in commercial sex.⁶⁹ Article 3 of the U.N. Protocol provides that the “recruitment, transportation, transfer, harboring or receipt of a child for the purposes of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a).”⁷⁰ These provisions are particularly important in cases involving minors because minors are recruited for prostitution through means that transcend the conventional legal definitions of force, fraud, or coercion used in trafficking jurisprudence.⁷¹

The U.N. Protocol “expanded the traditional definition of slavery” beyond the concepts of “ownership or buying and selling” to include circumstances “based on undue influence, control and exploitation.”⁷² In this way, the U.N. Protocol seeks to address “all aspects of trafficking in persons.”⁷³ The U.N. Protocol recognizes that trafficking in persons also can be accomplished through other means, including “abuse of power or of a position of vulnerability” or the “exploitation of the prostitution of others.”⁷⁴ The term “position of vulnerability” includes “the factors that

vant where any of the means set forth in subparagraph (a) have been used.”); *see also* MATTAR, *supra* note 33, at 3–4.

65. 18 U.S.C. § 1591(a)(2)–(b)(2) (2012) (emphasis added).

66. *Id.*

67. Kaethe Morris Hoffer, *A Response to Sex Trafficking Chicago Style: Follow the Sisters, Speak Out*, 158 U. PA. L. REV. 1831, 1837 (2010). Prior to the U.N. Protocol, the U.N. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others was adopted in 1949. However, the latter had limited effectiveness in eradicating trafficking. Grace Chang & Kathleen Kim, *Reconceptualizing Approaching to Human Trafficking: New Directions and Perspectives from the Field(s)* 3 STAN. J. C.R. & C.L. 317, 329 (2007).

68. *Id.*

69. As Professor Mattar has pointed out, the U.N. Protocol “extended the definition of trafficking in persons to include not only exploitation of the prostitution of others, but other forms of exploitation, including domestic service, begging, involvement of children in armed conflict, transnational marriages, marriages for child bearing, illegal adoption, removal of human organs and other forms of criminal activities.” MATTAR, *supra* note 33, at 3.

70. U.N. Protocol, *supra* note 46, art. 3, ¶ (c). The U.N. Protocol defines a “child” as anyone under eighteen years old. *See* U.N. Protocol, *supra* note 46 art. 3, ¶ (d).

71. Cheryl Nelson Butler, *Sex Slavery in the Lone Star State: Does the Texas Human Trafficking Legislation of 2011 Protect Minors?*, 45 AKRON L. REV. 843, 863–68 (2012).

72. *Id.*

73. U.N. Protocol, *supra* note 46, pmbl.

74. U.N. Protocol, *supra* note 46, art. 3. Article 3 defines “trafficking in persons” as: [T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other means of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of

make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment, and lack of equal opportunity.”⁷⁵ The provision includes those cases in which minors provide some level of complicity to be prostituted by adults, albeit with an inequality of bargain power.⁷⁶

The TIP Report makes clear that under these standards, human trafficking can exist even where the minor victim appears to “consent” to be exploited.⁷⁷ The TIP Report emphasizes several policy grounds for recognizing all prostituted minors as trafficking victims regardless of consent or proof of force, fraud, or coercion. The TIP Report affirms several policy grounds for an unconditional proscription, including the physical and psychological harms that minors suffer as a result of prostitution and other forms of sexual exploitation, such as “disease (including HIV/AIDS), drug addiction, unwanted pregnancy, malnutrition, social ostracism, and possible death.”⁷⁸

Moreover, TIP reports have emphasized the need to ensure that legislation follows these definitions for child sex trafficking.⁷⁹ In the 2011 TIP Report, Secretary of State Clinton argued that an effective approach to trafficking must address domestic child sex trafficking across the United States.⁸⁰

B. ACKNOWLEDGING CHILD SEX TRAFFICKING IN THE UNITED STATES

The TIP Report has the potential of playing a key role in shaping both international and domestic policy on sex trafficking—and to some extent, the report has done so. The Department of State has argued that the TIP Reports reflect the United States’ emerging understanding of the nature of human trafficking and the appropriate legal responses.⁸¹ TIP Ambassador CdeBaca marked the release of the 10th anniversary TIP Report as a time to celebrate not only “ten years of progress, but also ten years of

exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs

75. *Id.* art. 3, ¶ (a), art. 9, ¶ (b).

76. Hoffer, *supra* note 66, at 1836.

77. *Id.* (arguing that “people may be trafficking victims regardless of . . . whether they once consented to work for a trafficker, or whether they participated in a crime as a direct result of being trafficked”).

78. *Id.*

79. 2011 TIP REP., *supra* note 9, at 38 (“In the case of children, moreover, no improper means need to be established for the trafficking act to constitute a criminal offense, as children cannot consent in these circumstances.”).

80. *Id.* at 1. Secretary Clinton acknowledged that “trafficking in persons affects every region and every country in the world.” *Id.* Further, the former secretary stated that the United States and the international community “must ensure that our efforts continue to address all forms of trafficking, whether for sex or labor, *internal or transnational*, or affecting men, women, or children.” *Id.* (emphasis added).

81. CdeBaca, *supra* note 40 (“We have made progress in understanding a number of realities about human trafficking.”).

learning” about the nature of trafficking.⁸²

For example, the TIP Report has indicated that the Department of State has moved beyond many typical stereotypes of trafficking, many of which are relevant to sex trafficking. In particular, the Department of State rejected the myth that human trafficking is not a major epidemic in the United States.⁸³ A decade ago, U.S. legislators doubted the prevalence of child trafficking within the United States; however, skepticism gave way to acknowledgment that minors in the United States are at great risk and effective anti-trafficking laws are essential for their protection.⁸⁴

Furthermore, the 2010 TIP Report has discussed the Department of State’s self-proclaimed emerging understanding about the complex nature of sex trafficking schemes, including those used to exploit minors. Trafficking schemes extend beyond “the flat out duping or kidnapping of naïve victims” and instead include nuanced forms of coercion and exploitation that shape human trafficking into the quintessential invisible crime.⁸⁵ For example, the 2010 Report emphasized that initial consent to prostitution is not determinative in identifying a person as a victim of sex trafficking. Rather, as the 2010 Report acknowledges that an adult can be “coerced, forced or deceived into prostitution or maintained in prostitution through coercion.”⁸⁶ Likewise, the 2011 Report continued this dialogue about the need to increase understanding of the nature of sex trafficking. In particular, the report included as a “special topic of interest” a discussion of the techniques that sex traffickers use.⁸⁷ There, the Department of State seemed adopt a broad definition of the means that constitute sex trafficking, *e.g.*, that “there are other more subtle forms of fraud and coercion that also prevent a person from escaping compelled servitude,” including psychological coercion.⁸⁸

Throughout the TIP reports, the Department of State asserts its continued focus on not only international but also domestic child sex trafficking.⁸⁹ Accordingly, the Department of State has acknowledged throughout the TIP reports that the United States is not only a destination or transit country for trafficking but in fact a *source* country for trafficked persons.⁹⁰ This understanding is particularly important in the fight against sex trafficking because it creates the opportunity to use the TIP

82. *Id.*

83. *See id.* On the myth, *see 2011 Hearing, supra* note 7. (“We too are a source country for people in servitude.”).

84. *2011 Hearing, supra* note 7, at 1. (“When I first introduced the [TVPA], the legislation was met with a wall of skepticism and opposition Reports of vulnerable persons, especially women and children, being reduced to commodities for sale were often met with surprise, incredulity, or indifference.”).

85. 2010 TIP REP., *supra* note 2, at 5.

86. *Id.*

87. 2011 TIP REP., *supra* note 9, at 25-31.

88. *Id.*

89. *See id.*

90. CdeBaca, *supra* note 40.

Report as a tool to protect not only victims of international trafficking but also Americans who are trafficked, most of whom are trafficked for sex.⁹¹

In particular, the TIP Report also highlights the controversial issue of criminalization of child prostitutes. In particular, the TIP reports acknowledge conflicts between TIP legal standards and the U.S. legal approach to child sex trafficking. Under the TVPRA and the U.N. Protocol, all minors engaged in commercial sex acts are recognized as victims of human trafficking. However, the TIP Report exposes the reality that the United States is one of several countries in which these legal rules are not followed. In particular, the victim stories shed light on how a prostituted child's identification as a victim of trafficking, as opposed to a criminal, is dependent on whether or not the victim is foreign.

The 2011 TIP Report's use of victim stories not only functions as a powerful tool to educate the international community about the nature of child sex trafficking but also exposes the distinctions between legal support for international, as opposed to domestic, child victims.⁹² For example, the 2010 TIP report includes the sordid tale of the forced prostitution of Anna, a young woman from Albania who was kidnapped, brought to another country, and forced into prostitution. Anna was kept in prostitution by traffickers who beat her, cut her with knives, and other terrorist tactics.⁹³ When Anna went to police, she was deported back to Albania, along with her traffickers who continued to abuse her. She found safe haven only in the United States, which allowed her to settle there.⁹⁴

A 2010 TIP story about a domestic sex trafficking victim does not have the same happy ending. Harriet, an eleven year-old girl from the United States, ran away from home.⁹⁵ She then moved in with a thirty-two-year-old man who compelled Harriet into prostitution. Before she turned thirteen, Harriet was infected with several sexually transmitted diseases.⁹⁶ At thirteen years old, Harriet was arrested and charged with the crime of prostitution.⁹⁷ No effort was made to find or arrest her pimp. She was adjudicated as a juvenile delinquent and placed on probation and in juvenile custody.⁹⁸ Thus, in contrast to Anna, to whom the United States government provided a safe haven from prosecution in Albania, prostituted girls like Harriet are sent to jail and otherwise treated as criminals or juvenile delinquents.⁹⁹ Thus, American girls are deprived of their rights

91. See also 2010 TIP REP., *supra* notes 7-10.

92. See 2011 TIP REP., *supra* note 9, at 18.

93. 2010 TIP REP., *supra* note 2.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. See 2012 TIP REP., *supra* note 9, at 55 (featuring victim story of an American girl who describes how she felt like a criminal once sent to jail after being "rescued" from prostitution).

to victim identification and protection under the TVPRA and U.N. Protocol.

In a similar story from the 2011 TIP Report, the Department of State reemphasized that the prostitution of minors in the United States amounts to sex trafficking under federal law. Alissa, a sixteen-year-old girl from Dallas, dated an older man who convinced her to work for him as an escort, going on dates with men and having sex with them.¹⁰⁰ Alissa initially consented to prostitution but later objected and began to refuse.¹⁰¹ In response, the man later forced Alissa to work as a street prostitute and then confiscated her earnings.¹⁰² He assaulted Alissa on several occasions.¹⁰³ The 2011 TIP Report suggested that this scenario would constitute child sex trafficking under both the U.N. Protocol and the TVPRA based upon Alissa's age.¹⁰⁴

In the 2011 Report, Secretary of State Clinton pledged to help child sex trafficking victims like Alissa and Harriet.¹⁰⁵ Her comments include her own compelling narrative about witnessing the effects of child sex trafficking.¹⁰⁶ During a visit to a shelter for child survivors from abroad, the secretary was personally moved, and she recounted: "[L]ooking into the eyes of those girls and hearing their stories firsthand brought home for me once again the very real and personal tragedy of modern slavery."¹⁰⁷ Through this lens, Secretary Clinton called upon the international community to renew its focus on this and all forms of human trafficking.¹⁰⁸ "For the girls in the shelter," wrote Secretary Clinton, "we will remain steadfast in our efforts and truthful in our assessments."¹⁰⁹

The TIP Report's approach to addressing sex trafficking also reflects America's political struggles over the appropriate legal response and, hence, inconsistency in its TIP Report message on this highly charged issue. The need to eradicate sex trafficking has always been a central theme of the TIP Report. The early TIP reports reflected the U.S. foreign policy's prioritizing of sex trafficking of women and girls over other forms of human trafficking.¹¹⁰ Scholars have argued that the initial TIP reports included contradictory statements as to the legal rules regarding definitions of sex trafficking; for example, statements within earlier TIP reports contradicted the TVPA's definitions by conflating prostitution with traf-

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *See id.* at 18, 25.

105. 2011 TIP REP., *supra* note 9, at 1.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Anne T. Gallagher, *Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of U.S. Trafficking in Persons Reports* 384-85 (Dec. 2010), available at http://works.bepress.com/anne_gallagher/ (arguing that the 2001 Report's " cursory analysis focused heavily on trafficking for sexual purposes, ignoring other egregious forms of exploitation that met both the international and US definition").

ficking.¹¹¹ However, since 2009, the Department of State has made efforts to correct this problem in the TIP Report.¹¹²

By 2010, the TIP Report reflected the Obama administration's shift toward a broader anti-trafficking policy, one that focuses not only on sex trafficking of women and girls but also on other forms of trafficking recognized by the TVPRA, including forced labor, child sex tourism, forced marriage, child soldiering, and other abuses.¹¹³ This new approach grew out of the Department of State's evolving understanding that worldwide, more people are trafficked for labor than for sex.¹¹⁴

Yet, this broader approach did not mean that sex trafficking was no longer an important priority; rather, it was no longer privileged over other forms of sex trafficking. In fact, the Department of State has continued to use the TIP Report to express its strong commitment to eradicating sex trafficking worldwide.¹¹⁵ The TIP Report has condemned sex trafficking not only in the international but also the domestic context.¹¹⁶

C. APPLYING THE LEGAL STANDARDS: THE U.S. COUNTRY NARRATIVE

The year 2010 marked the first time the TIP Report included an assessment of the United States' anti-trafficking efforts.¹¹⁷ This assessment is officially called the United States Country Narrative (also referred to in this article as the "U.S. Report Card").¹¹⁸ Each TIP Report since 2010 has included a U.S. Country Narrative.¹¹⁹ There is no doubt that the inclusion of a U.S. Country Narrative has allayed criticism that the TIP Report was unfair, biased, and lacking in credibility.¹²⁰ In part due to the inclusion of the U.S. Country Narrative, Secretary Clinton opined that the 2011 TIP Report was "very thorough."¹²¹ In the 2010 report, and in each subsequent TIP Report, the Department of State reported, "[T]he U.S. government fully complies with the minimum standards for the elimination of trafficking."¹²²

The 2010 TIP Report acknowledged that human trafficking is a major

111. *Id.* at 386.

112. *Id.*

113. *Id.* at 385–86; 2010 TIP REP., *supra* note 2.

114. 2010 TIP REP., *supra* note 8, at 2.

115. 2012 TIP REP., *supra* note 9, at 33, 36; 2011 TIP REP., *supra* note 9, at 9–10, 12; 2009 TIP REP., *supra* note 36, at 22–25.

116. Gallagher, *supra* note 111, at 385.

117. Otero, *supra* note 1 ("And this year, the Report ranks the United States for the first time ever, holding itself to the same standards to which it holds others."); see 2010 TIP REP., *supra* note 2, at 338.

118. See 2010 TIP REP., *supra* note 2, at 3.

119. See *id.* at 55; see 2011 TIP REP., *supra* note 9, at 61; 2012 TIP REP., *supra* note 69, at 61; 2013 TIP REP., *supra* note 4, at 65.

120. See, e.g., *U.S. State Department Trafficking Report Undercut by Lack of Analysis*, HUMAN RIGHTS WATCH (June 11, 2013), <http://www.hrw.org/news/2003/06/10/U.S.-state-department-trafficking-report-undercut-by-lack-of-analysis.html>.

121. 2011 TIP REP., *supra* note 9, at 4 (quoting Hillary Rodham Clinton).

122. 2013 TIP REP., *supra* note 2, at 381; 2012 TIP REP., *supra* note 9, at 360; 2011 TIP REP., *supra* note 9, at 372; 2010 TIP REP., *supra* note 2, at 338.

epidemic in the United States.¹²³ The report notes that while labor trafficking is more prevalent than sex trafficking in the United States, sex trafficking nevertheless is pervasive, and as such, is often a significant part of labor trafficking schemes.¹²⁴ Most of the victims of sex trafficking schemes in the United States are American citizens, particularly minors who are runaway and homeless youth.¹²⁵

The U.S. Country Narratives have exposed ways in which child sex trafficking laws and policies in the United States fail to meet the 4P minimum standards. The reports identify tensions between federal and state law approaches to child sex trafficking. For example, federal and state law enforcement officials do not share a consensus that prostituted persons are often trafficking victims.¹²⁶ The 2010 Report noted that “law enforcement are [sic] sometimes untrained or unwilling to undertake victim protection measures.”¹²⁷

Moreover, the U.S. Country Narratives also have noted how inconsistencies between federal and state law undermine victim protection. Two years later, the 2012 report reiterated that, while the federal government continued to train state and local law enforcement officers on how to identify persons as “trafficked” under the TVPRA, “some federal, state, and local law enforcement officials were reluctant to identify individuals as trafficking victims when they have participated in criminal activity.”¹²⁸ As a result of such misidentification, trafficked persons are wrongfully arrested and prosecuted as criminals instead of provided with victim services.¹²⁹ Likewise, the inaugural 2010 self-assessment noted that the “government services for trafficked U.S. citizen children were not well coordinated.”¹³⁰ As Carol Smolenski, Executive Director of ECPAT-USA recently testified before Congress:

As Carol Smolenski, Executive Director of ECPAT-USA recently testified:

A shortcoming of the Report is that it does not show the many things that we still need to do to prevent children from being trafficked Prevention is everything. It is a disappointment that we are still counting how many services were provided and how many arrests are made, when what we really need is a laser-like focus on preventing vulnerable children from being ensnared by traffickers in the first place.¹³¹

123. The 2010 TIP Report recognized that the United States is “a source, transit and destination country for men, women and children subjected to trafficking in persons, specifically forced labor, debt bondage, and forced prostitution.” 2010 TIP REP., *supra* note 2, at 338.

124. *Id.*

125. *Id.*

126. *See id.*

127. *Id.*

128. 2012 TIP REP., *supra* note 9, at 363–64.

129. *Id.*

130. 2010 TIP REP., *supra* note 2, at 388.

131. *Tier Rankings in the Fight Against Human Trafficking: Hearing Before the Subcomm. on Afr., Global Health, Global Human Rights, & Int’l Orgs. Of the H. Comm. on*

Subsequent U.S. Country Narratives affirm that some of these problems continue to persist.¹³²

In other ways as well, the U.S. Country Narratives have recognized the inconsistencies between federal and state law paradigms for child sex trafficking.¹³³ The 2010 TIP Report noted that U.S. state laws do not follow the TVPRA and U.N. Protocol.¹³⁴ One year later, the 2011 Report indicated that, on the one hand, these inconsistencies remained; 45 states had anti-trafficking statutes but these laws applied “varying definitions” of child sex trafficking.¹³⁵ On the other hand, substantial progress had been made in the enactment of anti-trafficking laws on the state and local levels.¹³⁶

Likewise, the 2013 Country Narrative noted both progress and persisting problems. The report noted that, while inconsistent state trafficking policies result in the wrongful arrest and prosecution of prostituted minors, fourteen states have responded by enacting “safe harbor” legislation “to ensure that children are treated as victims and provided services.”¹³⁷ The report cautioned that: “[W]hile these laws reflect an increased effort by state legislatures, observers report that state anti-trafficking laws generally lack uniformity and consistency across jurisdictions.”¹³⁸

The TIP Reports have included some recommendations for the United States’ fight against child sex trafficking. The reports do not offer much in terms of solutions to the inconsistent legal definitions of child sex trafficking. However, other issues are addressed. For example, the 2010 Report advised that the United States improve data collection.¹³⁹ It also recommended that the United States offer additional and enhanced training to federal agents in the proper identification of trafficking victims.¹⁴⁰ Another recommendation is that the U.S. federal government increase support for anti-trafficking task forces and develop partnerships as well as other efforts to help identify those American citizens who are trafficked in the United States.¹⁴¹

Foreign Affairs, 113th Cong. (2013) [hereinafter *Hearing on the Fight Against Trafficking*] (statement of Carol Smolenski, Exec. Director, End Child Prostitution and Trafficking—USA). In response, she supports legislation introduced by Representative Bass to “strengthen the child welfare response to human trafficking.” *Id.*

132. 2012 TIP REP., *supra* note 9, at 363; 2013 TIP REPORT, *supra* note 2, at 30-31 (discussing how misconceptions about trafficking continue to undermine victim identification.).

133. 2013 TIP REP., *supra* note 2, at 381-87.

134. *Id.* (“The 2012 [TIP] report shows that children who are sexually exploited are still being arrested rather than offered support and protection . . .”).

135. 2011 TIP REP., *supra* note 9, at 381-87.

136. *Id.*

137. 2013 TIP REP., *supra* note 2, at 383.

138. *Id.*

139. 2010 TIP REP., *supra* note 2, at 338-39.

140. *Id.*

141. *Id.*

IV. REVISITING U.S. CHILD SEX TRAFFICKING UNDER THE 4PS

This section considers whether U.S. anti-trafficking laws and policies undermine the TIP standards and suggests changes to improve compliance. Even though the Department of State pressures other nations to adhere to the anti-trafficking standards set forth in the U.N. Protocol and the TVPRA, it has not succeeded in compelling U.S. states to conform their anti-trafficking laws to these standards. On one hand, the federal government has demonstrated a commitment to developing a strong U.S. domestic trafficking law and policy.¹⁴² This commitment is reflected in Congress's repeated reauthorization of the TVPRA, the creation of new federal human trafficking offenses under the TVPRA, and an increase in the number of federal human trafficking prosecutions under the statute both within the United States and abroad.¹⁴³ To some extent, the federal government has also increased the availability of services to victims within the United States.¹⁴⁴

A. PROTECTION

Conflicts between federal and state trafficking laws undermine the TIP minimum standards in part because they sabotage the identification of children who are commercially exploited for sex.¹⁴⁵ The Department of State recognizes proper victim identification as a critical component of a viable trafficking victim protection strategy.¹⁴⁶ Indeed, a country's TIP ranking is determined in part by whether a country has "proactive victim identification measures with systematic procedures to guide law enforcement and other government-supported front-line responders in the process of victim identification."¹⁴⁷ Still, the Department of Justice has acknowledged that the "government's greatest challenge for the immediate future [is] to identify and bring forward more victims."¹⁴⁸

How federal and state laws define child sex trafficking determines which sexually exploited minors receive rehabilitative social services and other legal protections. State trafficking laws that exclude a large percentage of prostituted minors from the definition of "trafficking victim" leave these vulnerable minors at risk for arrest and further sexual exploitation while extending leniency toward the adults who buy, sell, and otherwise exploit these minors for sex.¹⁴⁹ Thus, identification as a "trafficking vic-

142. See Tiefenbrun, *supra* note 56, at 255–62.

143. *Id.* at 255–59, 268.

144. *Id.* at 260–62.

145. See 2011 TIP REP., *supra* note 9, at 11.

146. *Id.* at 40.

147. *Id.* at 11.

148. OFFICE OF THE ATT'Y GEN. OF TEX., THE TEXAS RESPONSE TO HUMAN TRAFFICKING 22 (2008) (quoting U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 7 (2013)).

149. Ian Urbina, *Running in the Shadows: For Runaways, Sex Buys Survival*, N.Y. TIMES (Oct. 26, 2009), www.nytimes.com/2009/10/27/us/27runaways.html?_r=1&.

tim” may spare minors the humiliation of being arrested, detained, and classified as a criminal or delinquent.¹⁵⁰ Moreover, persons designated as “victims” of a trafficking crime may file civil suits.¹⁵¹

Conflicting definitions of sex trafficking of minors contribute to the lack of consensus among law enforcement personnel, lawyers, judges, and other stakeholders about who qualifies as a victim of human trafficking.¹⁵² The split among jurisdictions as to whether to apply the force, fraud, or coercion standard, the FFC test, to minors is a major source of this confusion.¹⁵³ Funding for training lawyers and law enforcement will help to address this problem.¹⁵⁴ State laws need a statutory scheme that models federal law’s treatment of minors as victims in order to address this problem.¹⁵⁵

Eliminating the FFC test will also prevent local law enforcement authorities from using stereotyped notions of consent and coercion as measures for identifying minors trafficked for sex. It is difficult for a law enforcement officer to make an accurate initial determination that a minor has or has not been coerced; officers frequently presume a lack of coercion.¹⁵⁶ For example, the Texas Attorney General has explained that, particularly in cases involving American victims, law enforcement officials presume the prostituted teens they encounter are guilty criminals, not crime victims.¹⁵⁷ Based on these findings, the Texas Attorney General advocated that the state legislature adopt the position taken by the Department of Justice (“DOJ”), namely, that minors who are victims of commercial exploitation should be treated as trafficking victims instead of juvenile delinquents.¹⁵⁸

150. See Geneva O. Brown, *Little Girl Lost: Las Vegas Metro Police Vice Division and the Use of Material Witness Holds Against Teenaged Prostitutes*, 57 CATH. U. L. REV. 471, 502 (2008).

151. See Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN’S L.J. 1, 1 (2004).

152. See SHARED HOPE INT’L, THE PROTECTED INNOCENCE CHALLENGE: STATE REPORT CARDS ON THE LEGAL FRAMEWORK OF PROTECTION FOR THE NATION’S CHILDREN (2011), available at http://sharedhope.org/wp-content/uploads/2012/10/pic_challengereport_2011.pdf [hereinafter Shared Hope Int’l]; OFFICE OF THE ATTORNEY GEN. OF TEX., *supra* note 148, at 26–27 (2008).

153. See SHARED HOPE INT’L, *supra* note 152, at 27.

154. See OFFICE OF THE ATTORNEY GEN. OF TEX., THE TEXAS RESPONSE TO HUMAN TRAFFICKING 26–27.

155. See *Fight Sex Trafficking of Minors in Texas: Remove the Need to Prove Coercion of Minor Victims of Sexual Exploitation*, CHILDREN AT RISK, <http://www.childrenatrisk.org/policy/legislative-priorities/fight-sex-trafficking-of-minors-in-texas/> (last visited Sept. 25, 2013) [hereinafter CHILDREN AT RISK].

156. See OFFICE OF THE ATT’Y GEN. OF TEX., *supra* note 148, at 24 (“Many prostitutes picked up in raids across the State may in fact be victims of human trafficking, particularly when the suspects are minors. These victims are treated as criminals. Once they make it through the criminal justice system, they are released back onto the street to perpetuate the cycle.”).

157. *Id.*

158. *Id.* at 35.

The inability to recognize victimized minors means that human trafficking task forces cannot properly report on the number of victims in need of services.¹⁵⁹ The Texas Attorney General found that “professionals who come into contact with potential victims may not be sufficiently knowledgeable to recognize human trafficking indicators.”¹⁶⁰

The FFC test stands as a formidable barrier to identifying prostituted minors as trafficking victims and closes off the critical social services that protect them and prevent future crimes. These services include safe harbor shelters with programs specifically tailored to meet the needs of minors, as well as programs that aim to combat the demand for sex with children and teens.¹⁶¹ Minors who fail to meet restrictive definitions are also deprived of witness protection programs, specialized services, and opportunities for immunity from prosecution.¹⁶²

B. PROSECUTION

The use of an FFC test in child sex trafficking cases is a major impediment to effective prosecution.¹⁶³ As prosecutors have argued, the burden of proof is much too high to meet, especially in cases involving children.¹⁶⁴ Victims of commercial sexual exploitation—especially child victims—often are avoidant and suffering from Stockholm Syndrome.¹⁶⁵ Sexually exploited minors who suffer from Stockholm syndrome have developed an emotional bond with their traffickers.¹⁶⁶ Thus, these minors were unwilling or unable to corroborate the claim that they were forced to perform sex acts.¹⁶⁷ The FFC requirement further undermines prose-

159. *Id.* at 25.

160. *Id.* at 28.

161. SMITH ET AL., *supra* note 16, at vi.

162. *Examining U.S. Efforts to Combat Human Trafficking and Slavery: Hearing Before the Subcomm. on the Constitution, Civil Rights & Prop. Rights of the S. Comm. on the Judiciary*, 108th Cong. 24–26 (2004) (statement of Wendy Patten, Advocacy Director, Human Rights Watch).

163. See Moira Heiges, Note, *From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad*, 94 MINN. L. REV. 428, 437 (2009).

164. *Id.* at 451–52.

165. Kalen Fredette, *International Legislative Efforts to Combat Child Sex Tourism: Evaluating the Council of Europe Convention on Commercial Child Sexual Exploitation*, 32 B.C. INT'L & COMP. L. REV. 1, 24–25 (2009). On the role of Stockholm Syndrome in sex trafficking cases, see AMANDA WALKER-RODRIGUEZ & RODNEY HILL, HUMAN SEX TRAFFICKING, available at http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/march_2011/human_sex_trafficking. (“Similar to cases involving Stockholm Syndrome, these victims, who have been abused over an extended period of time, begin to feel an attachment to the perpetrator.”) (citing Nathalie De Fabrique, Stephen J. Romano, Gregory M. Vecchi, and Vincent B. Van Hasselt, *Understanding Stockholm Syndrome*, FBI Law Enforcement Bulletin, July 2007, 10–115).

166. SHARED HOPE INT'L, DOMESTIC CHILD SEX TRAFFICKING IN ARIZONA 22 (2010) (“Securing a victim’s testimony is one of the most challenging dynamics in the prosecution of a trafficker. Victim testimony can be compelling evidence if prosecutors overcome the victim’s emotional attachment to the trafficker, negate potentially violent and dangerous consequences for the victim and his / her family and deter the victim from running away before trial.”).

167. SHARED HOPE INT'L, DALLAS ASSESSMENT, *supra* note 20, at 28.

cutions by encouraging forum shopping between states.¹⁶⁸

There are several negative consequences for permitting forum shopping. First, traffickers will prefer to exploit children in states that require proof of FFC over states that do not.¹⁶⁹ Second, traffickers are subject to the lower penalties found in the prostitution codes versus the state trafficking statute.¹⁷⁰ Third, trafficking cases are not tracked or reported as trafficking cases.¹⁷¹ Fourth, the lower penalties are a disservice to victims. The FFC rule undermines prosecutions further by wasting time and money prosecuting minors who are victims instead of focusing resources on adults who sexually abuse and exploit those victims.¹⁷² Eliminating the rule in cases involving minors would allow prosecutors to instead target traffickers, not victims.¹⁷³

C. PREVENTION

State FFC rules obscure the reality that prostitution of minors is a form of child abuse. Instead of recognizing that prostituted minors are victims of criminal abuse, state trafficking laws instead presume that minors consent to prostitution, thereby creating a presumption that is rebuttable only with proof of force, fraud, or coercion. However, such laws leave minors vulnerable to arrest and prosecution as criminals instead of being recognized legally as victims.¹⁷⁴ The adults who purchase minors for commercial sex are rarely punished criminally for their role in the same act of prostitution.¹⁷⁵ States that adopt an FFC test move legal responsibility for child sex trafficking away from where it belongs—with the exploitative adults who prostitute and purchase sex with kids.

Instead, state legislatures should provide services that reflect a child welfare response that acknowledges that child prostitution is child abuse.¹⁷⁶ A child welfare response demands that American prostituted

168. SHARED HOPE INT'L, *supra* note 152, at 27 ("States must enact human trafficking laws that are consistent with each other and Federal law in scope and penalty so as to prevent migration of trafficking crimes to more lenient states or onto tribal lands.").

169. *See id.*

170. *See infra* note 262 and accompanying text.

171. *See infra* note 262 and accompanying text.

172. *See* CHILDREN AT RISK, *supra* note 155.

173. *See id.*

174. *See* Brown, *supra* note 150, at 502–03.

175. Samantha Healy Vardaman & Christine Raino, *Prosecuting Demand as a Crime of Human Trafficking: The Eighth Circuit Decision in United States v. Jungers*, 43 U. MEM. L. REV. 917, 931 (2013) ("In 2005, Congress stated in findings supporting the End Demand for Sex Trafficking Act of 2005 that eleven females engaged in commercial sex acts were arrested in Boston for every one arrest of a male purchaser, nine to one in Chicago, and six to one in New York City."). Courts have begun to find the purchasers of commercial sex guilty of human trafficking. *See* United States v. Jungers, 702 F.3d 1066 (8th Cir. 2013). Furthermore, the federal government has clarified that purchasers of sex with a minor are considered criminally liable under the TVPRA. *See* SHARED HOPE INT'L, DEMANDING JUSTICE PROJECT: BENCHMARK ASSESSMENT 10–12 (2013).

176. *See* Linda Smith & Samantha Vardaman, *A Legislative Framework at Combating Domestic Minor Sex Trafficking*, 23 REGENT L. REV. 265, 292 (2010); SMITH ET AL., *supra* note 16, at 47–60.

minors receive the same social services long reserved for foreign victims.¹⁷⁷ States have a more compelling interest in protecting minors from sexual abuse and exploitation than in presuming that a minor can “consent” to be prostituted by an adult. A legal rule that recognizes a minor’s right to sell sex, especially through a pimp, undermines the important public policy goal of protecting minors from exploitation by adults.¹⁷⁸ These services should include rehabilitative programs that acknowledge that prostitution has caused serious physical and psychological trauma among these minors.¹⁷⁹ This would be a step in the right direction.

D. PARTNERSHIPS

Partnerships between government agencies and other community stakeholders are a critical component of any country’s anti-trafficking strategy.¹⁸⁰ The anti-trafficking community recognizes that survivors of sex trafficking can serve as important partners in the anti-trafficking movement.¹⁸¹ Survivors have lobbied for legislation, founded social service organizations for other survivors, and otherwise helped to raise public awareness about the realities for sexual exploitation. Minors have been central in the emerging role of survivors as advocates.¹⁸² Yet, state laws that presume that prostituted minors are criminally responsible for their own sexual exploitation undermine these efforts to empower minors who have been abused.¹⁸³

Victim misidentification also threatens efforts to develop anti-trafficking partnerships in critical ways. It deprives experts in the child welfare system of critical opportunities to protect prostituted minors and prevent further exploitation by providing them with much needed social services.¹⁸⁴ Furthermore, without identified victims, there is virtually no work for partnerships to accomplish.

177. See Tamar R. Birkhead, *The “Youngest Profession”: Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1077–78.

178. See *id.* at 1106–07.

179. See U.S. DEP’T OF HEALTH & HUMAN SERVS., TREATING THE HIDDEN WOUNDS: TRAUMA TREATMENT AND MENTAL HEALTH RECOVERY FOR VICTIMS OF HUMAN TRAFFICKING (2008).

180. Jonathan Todres, *The Private Sector’s Pivotal Role in Combating Human Trafficking*, 3 CAL. L. REV. CIR. 80, 82–83 (2012). On the public health risks of sex trafficking, see generally, Jonathan Todres, *Assessing Public Health Strategies for Advancing Child Protection: Human Trafficking as a Case Study*, 21 J.L. & POL’Y 93 (2012). Note also that with respect to partnerships, Carol Smolenski mentions the Federal Strategic Action Plan on Services of Victims of Human Trafficking and the need for the juvenile justice system and others to work together on partnerships. *Hearing on the Fight Against Trafficking*, *supra* note 132.

181. See SEX TRAFFICKING SURVIVORS UNITED, <http://www.sextraffickingsurvivorsunited.org> (last visited Sept. 2, 2014).

182. See *id.*

183. See Shared Hope Int’l, *supra* note 152, at 27.

184. 2013 TIP REP., *supra* note 4, at 30–31.

V: RECOMMENDATIONS: USING TIP STANDARDS TO PROTECT MINORS

A. SHOULD INCONSISTENT CHILD SEX TRAFFICKING LAWS IMPACT TIER 1 STATUS?

Does the lack of uniformity between U.S state and federal law call for a downgrade of the United States from its coveted Tier 1 designation? A country's lack of anti-trafficking legislation does not automatically eliminate its Tier 1 status.¹⁸⁵ Indeed, the inconsistencies alone do not mean that the United States has not made great strides in combating human trafficking.¹⁸⁶ Furthermore, the standards for TIP placements are flexible and subjective. As stated *supra*,¹⁸⁷ a country can achieve Tier 1 status even if it has a major trafficking epidemic, as long as its government has made efforts to address the problem.¹⁸⁸ Moreover, a Tier 1 ranking does not require that a "country has devised perfect solutions or has ended modern slavery within its borders."¹⁸⁹ Thus, arguably, the Department of State is not required to downgrade any country to Tier 2 based on any single dispositive factor. Applying this standard, the failure of the United States to compel or convince state legislatures to enact legislation that complies with the TVPRA and U.N. Protocol does not require a downgrade to Tier 2 status for the United States.

Still, the Department of State considered similar factors in determining tier placements and downgrades for other countries. For example, when the Department of State upgraded India from the Tier 2 Watch List to Tier 2 in 2011, it considered that country's increased efforts to combat trafficking on not only the federal level, but also the state level.¹⁹⁰ India's approach included steps by its federal government to compel state governments to take action.¹⁹¹ For example, India's Ministry of Labor called upon all of its state-level labor secretaries to appoint officers to focus on child labor trafficking, as well as bonded labor.¹⁹² On the state level, some governments established missing person bureaus in each police district and organized state border patrols to aid in the search for trafficking

185. 2011 TIP REP., *supra* note 9, at 17.

186. On the Obama administration's achievements in the area of human trafficking, see generally OFFICE TO MONITOR & COMBAT TRAFFICKING IN PERSONS, OBAMA ADMINISTRATION ACCOMPLISHMENTS ON COMBATING TRAFFICKING IN PERSONS AS OF FEBRUARY 2013 (2013), available at www.state.gov/documents/organization/207420.pdf.

187. See *supra* Part III.C.

188. 2011 TIP REP., *supra* note 9, at 17.

189. *Id.*

190. 2011 Hearing, *supra* note 7, at 14 (statement of Hon. Robert O. Blake, Assistant Secretary of State, Bureau of East Asian and Pacific Affairs) ("[India has] achieved landmark convictions against bonded labor traffickers, with punishments of significant prison sentences, and increased rescue and rehabilitation efforts of thousands of trafficking victims in many parts of India. This good work continues at both the state and Federal levels.").

191. 2011 Hearing, *supra* note 2, at 17 (statement of Hon. Luis CdeBaca, Ambassador-at-Large, Office to Monitor and Combat Trafficking in Persons).

192. *Id.*

victims.¹⁹³ On the local level, India's police also ended the practice of arresting prostituted girls and instead now identify them as trafficking victims in need of services and legal protection.¹⁹⁴ While some disparities still remain as to how state governments in India address child sex trafficking, these governments are taking steps to achieve a uniform, victim-centered approach.¹⁹⁵

India's upgrade suggests that the United States must resolve its own inconsistencies between federal and state anti-trafficking laws in order to protect the TIP Report's integrity and moral authority. In the 2013 TIP Report, Secretary of State John Kerry argued that the United States must fight human trafficking because it is a crime that "undermines the rule of law."¹⁹⁶ Secretary Kerry also emphasized: "We also have a moral obligation to meet this challenge head-on. Human trafficking is an assault on our most dearly held values of freedom and basic human dignity. American leadership means protecting those values at home and working to advance them around the world."¹⁹⁷

As one of the countries to receive a Tier 1 ranking under the TIP Report, the United States has a moral and legal obligation to ensure that state and local governments comply with TIP Report standards, yet this obligation has not been met. In several ways, state and local governments have failed to follow the approach to child sex trafficking set forth in the TVPRA and the U.N. Protocol.¹⁹⁸ The lack of uniformity among state laws addressing child prostitution and child sex trafficking is alarming. First, several states do not have any legislation recognizing child sex trafficking as a distinct crime.¹⁹⁹ Second, while the majority of states do have anti-trafficking laws, many of these laws fail to address domestic child sex trafficking.²⁰⁰ Third, while the U.N. Protocol and TVPRA recognize all prostituted minors as victims of human trafficking, at least fourteen state trafficking laws only recognize prostituted minors as "trafficked" in those limited number of cases in which force, fraud, or coercion is proven.²⁰¹ Thus, adding these fourteen states to the six states that have no specific child sex trafficking laws at all, it becomes clear that nearly half of the American states have failed to comply with the definitions of child sex trafficking set forth in the U.N. Protocol and the TVPRA.²⁰²

This lack of uniformity among the statutory definitions of child sex trafficking has opened the door to other forms of noncompliance by states

193. *Id.*

194. *Id.* at 47 (statement of Hon. Robert O. Blake, Assistant Secretary of State, Bureau of East Asian and Pacific Affairs).

195. *See id.*

196. Kerry, *supra* note 2.

197. *Id.*

198. As of 2012, Virginia, Pennsylvania, Nevada, Maine, Hawaii, and Colorado had no separate law for child sex trafficking, *supra* note 152, at 128, 140, 156, 174, 194, 210.

199. *Id.*

200. *Id.* at 19.

201. *See id.* at 117–219.

202. *See id.*

with the TVPRA. In states where there is not a criminal statute that recognizes prostituted minors as trafficking victims, sexually exploited minors may be ineligible for rehabilitation programs reserved for persons legally identified as trafficked.²⁰³ State prostitution laws continue to treat prostituted minors as criminals or juvenile delinquents, as opposed to crime victims.²⁰⁴ Not surprisingly then, in 2012, at least one nongovernmental organization gave forty-three states a grade of “C” or lower in its annual report card rankings of American anti-trafficking legislation.²⁰⁵

B. STRENGTHENING THE FEDERAL RESPONSE

Since the threat of a lowered Tier ranking is an unlikely political or legal response to domestic child sex trafficking, the U.S. government must adopt alternative strategies for achieving stronger compliance with TIP standards. The Obama administration has taken several initiatives that improve federal and state collaboration on anti-trafficking issues and, in doing so, has helped to protect America’s Tier 1 status. As part of his historic federal Strategic Action Plan to Combat Trafficking, President Obama set as a primary goal an increase in partnerships and collaborations between the federal state and local government agencies.²⁰⁶ Recognizing that real change happens “from the bottom up,” President Obama authorized a new grassroots report from faith-based organizations to determine additional strategies for combating trafficking on a grassroots level.²⁰⁷

The TVPRA of 2013 contains several provisions which strengthen U.S. compliance with TIP minimum standards. For example, the TVPRA of 2013 expands local law enforcement grants for investigations and prosecutions of human trafficking.²⁰⁸ Furthermore, the TVPRA of 2013 also provides additional financial resources to enhance state and local efforts to combat human trafficking.²⁰⁹ These provisions include funding to establish a block grant to develop programs to aid domestic minor victims for sex trafficking.²¹⁰

Arguably, the impact of these provisions will be limited in states where legislation confines the definition of child sex trafficking to those cases where force, fraud, or coercion must be proven. As discussed in the next section, even with the added resources provided by the TVPRA of 2013, the existence of any state laws that conflict with the TVPRA’s definition of child sex trafficking will continue to undermine the 4Ps and the credibility of the United States’ Tier 1 ranking. In light of these new executive

203. See, e.g., *id.* at 129.

204. *Id.* at 9.

205. *Id.* at 12.

206. OFFICE FOR VICTIMS OF CRIME, FEDERAL STRATEGIC ACTION PLAN ON SERVICES FOR VICTIMS OF HUMAN TRAFFICKING IN THE UNITED STATES 2013-2017 (2012).

207. President Barack Obama, Address at the Clinton Global Initiative conference (Sept. 25, 2012).

208. 42 U.S.C. § 14044(c) (2012).

209. *Id.* § 1404(a).

210. *Id.*

and legislative initiatives, it is all the more imperative that the federal government focus on the state and local laws and policies that undermine federal child sex trafficking laws.

C. CREATING EFFECTIVE "MODEL" STATE LAWS

The U.S. government must focus on resolving these inconsistent federal and state laws because former federal policy responses to child sex trafficking undermined the development of state laws that complied with the TVPRA. The former Department of Justice Model State Anti-Trafficking Criminal Statute (DOJ Model Law) reflected this lapse.²¹¹ Mindful that the TVPRA alone cannot address the problem of domestic trafficking, the DOJ wrote the former DOJ Model Law to encourage states to enact state trafficking laws consistent with the policies underlying the TVPRA.²¹² Of major importance was the "strong need for uniformity in definitions and concepts across state lines to minimize confusion as trafficking victims in state prosecutions begin to seek the victim protections available through" federal agencies.²¹³

Yet, unlike the TVPRA, the former DOJ Model Law arguably did not strictly proscribe sex trafficking of minors.²¹⁴ The definitions section of the DOJ Model Law recommended a strong stance against child sex trafficking, but other provisions undermined this strong stance.²¹⁵ Furthermore, the provision prohibited a broad list of means of trafficking minors.²¹⁶ The DOJ Model Law included a catch-all phrase stating that acquiring a minor "by any means" would constitute child sex trafficking.²¹⁷ Significantly, the DOJ made clear that the provision filled in the loopholes left by the FFC test.²¹⁸ Under the DOJ Model Law, "Sexual Servitude of a Minor" was an independent offense that did not require proof of force, fraud, or coercion.²¹⁹ The DOJ interpreted its model law as "the equivalent of Statutory Rape laws, which obviate the need to prove coercion when the victim is under the age of legal consent."²²⁰ The DOJ Model Law had some positive impact in states that adopted these

211. See COUNCIL OF STATE GOVERNMENTS, MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE (2007).

212. See *id.*

213. See *id.*

214. See *id.*

215. See *id.*

216. *Id.*

217. *Id.* This section provides that:

Whoever knowingly recruits, entices, harbors, transports, provides, or obtains by any means . . . another person under [eighteen] years of age, knowing that the minor will engage in commercial sexual activity, sexually explicit performance, or the production of pornography . . . or causes or attempts to cause a minor [to do so], shall be punished by imprisonment.

Id. (emphasis added). The DOJ State Model Law also makes "Involuntary Servitude" and "Trafficking for Forced Labor and Services" separate offenses. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* The Explanatory Notes further added: "This Section would allow for trafficking prosecutions in cases in which minors are kept in prostitution because of their circum-

broad definitions of child sex trafficking verbatim.²²¹ Several states adopted the former DOJ Model Law's provisions.²²²

Even so, arguably, several provisions of the DOJ Model Law undercut its otherwise broad protections for minors, and perhaps this explains why the DOJ ultimately withdrew the DOJ Model Law. For example, the Model Law suggested enhanced sentencing for trafficking minors by using force, fraud, or coercion.²²³ The Model Law also staggered penalties based on the age of the victim.²²⁴ By considering these "means of exploitation" as criteria for enhancing punishments, the Model Law suggested that a case involving force, fraud, or coercion represented a more egregious form of trafficking than other cases.²²⁵

The Uniform Act on Prevention and Remedies for Human Trafficking ("Uniform Act") can help create more uniformity between the federal and state law approaches to child sex trafficking.²²⁶ In 2013, the Uniform Law Commission (ULC) adopted the Uniform Act to create uniformity among state anti-trafficking laws.²²⁷ A coalition of legal advocacy groups, including the American Bar Association, expressed strong support for the Uniform Act.²²⁸ Significantly, according to its drafters, the Uniform Act is

stances but overt force is not used, such as is common in cases involving runaway U.S. citizen youth."

221. See Melynda H. Barnhart, *Sex and Slavery: An Analysis of Three Models of State Human Trafficking Legislation*, 16 WM. & MARY J. WOMEN & L. 83, 102, 107 (2009) (noting that, as of 2009, "Twenty-five [states had] adopted most or all of the language of the Model Law, including means of trafficking elements similar to the former federal formulation of force, fraud and coercion").

222. Delaware, Wisconsin, Nebraska, and the District of Columbia, for example, adopt almost verbatim the Model State Law's definition of child sex trafficking. See SHARED HOPE INT'L, *supra* note 152, at 27–28. Other states, such as Colorado, have borrowed language from the Model State Law to criminalize the "sexual exploitation of a child." See *id.*; COLO. REV. STAT. § 18-6-403(3)(a) (2010). In lieu of proof of FFC, the Colorado statute criminalizes any act which "causes, induces, entices, or permits a child to engage in, or be used for" certain commercial sex acts. § 18-6-403(3)(a). Illinois state law adopts similar language yet goes a step forward to expressly recognize those cases in which "there is no overt force or threat" used to sexually exploit the minor. 720 ILL. COMP. STAT. 5/10(c) (2013).

223. COUNCIL OF STATE GOVERNMENTS, *supra* note 209.

224. Violations involving overt force, fraud, or coercion on a minor are punishable by up to twenty-five years imprisonment. *Id.* The penalties for cases not involving overt force, fraud, or coercion on a minor depend on whether the minor has reached the age of consent, such that cases involving minors who have not reached the age of majority draw higher penalties than those involving older juveniles. *Id.*

225. Cf. Barnhart, *supra* note 219, at 102 (critiquing the Model Law for focusing on the "means of exploitation, rather than the underlying form of exploitation").

226. UNIFORM LAW COMMISSION, THE UNIFORM ACT ON PREVENTION AND REMEDIES FOR HUMAN TRAFFICKING, available at http://www.uniformlaws.org/shared/docs/Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking/2013AM_UPRHT_As%20approved.pdf [hereinafter UNIFORM ACT].

227. See ATEST, UNIFORM ACT ON PREVENTION AND REMEDIES FOR HUMAN TRAFFICKING, available at http://www.endslaveryandtrafficking.org/research_resources/uniform-act-prevention-and-remedies-human-trafficking.

228. ATEST, LETTER OF SUPPORT TO THE UNIFORM LAW COMMISSIONERS (July 3, 2013), available at http://www.endslaveryandtrafficking.org/research_resources/atest-letter-support-uniform-law-commissioners; FREEDOM NETWORK USA, FREEDOM NETWORK SUPPORTS THE UNIFORM LAW COMMISSION'S APPROVAL OF THE UNIFORM ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING (July 13, 2013), available at <http://>

aimed at compromise—its provisions are those that all states could agree upon.²²⁹

In most respects, the Uniform Act encourages states to adopt provisions that model the TVPRA's approach to child sex trafficking.²³⁰ For example, the Uniform Acts support for safe harbor laws will also foster compliance with the TIP Report's 4P strategy.

Yet differences between the TVPRA and Uniform Law's approach to "end demand" suggest that some key differences will remain between federal and state child sex trafficking law and policies. Legislators have advocated revisions to the TIP standards that reflect politicized debates over the proper legal response to combat child sex trafficking. In May 2014, Congressmen Hultgren sponsored HR 4703, legislation that, if enacted, would amend the TIP standards to expressly penalize countries who fail to "reduce demand for sex slavery" by reducing demand for prostitution.²³¹ HR 4703 seeks to designate those countries who fail to criminalize the buying of sex as noncompliant with the TIP minimum standards.²³²

This debate over "end demand" indicates that the TIP Report is stuck in the crosshairs of the debate over how to define sex trafficking.²³³ Arguably, the legislation resurrects prior efforts by advocates to conflate all prostitution with sex trafficking under the TVPRA.²³⁴ However, earlier battles to adopt similar amendments were lost.²³⁵ While the TVPRA has been amended several times, of the statute does not identify all prostitution as sex trafficking.²³⁶

In the United States, the debate over whether the TVPRA should conflate all adult prostitution with sex trafficking played a major role in shap-

freedomnetworkusa.org/freedom-network-supports-the-uniform-law-commissions-approval-of-the-uniform-act-on-prevention-of-and-remedies-for-human-trafficking.

229. ATEST, ATEST CONFERENCE CALL ON ULC, COMMENTS BY MEREDITH RICHARD, ("the Uniform Law is not meant to be a model law. So it is not meant to have everything that we as advocates would want to have in it. It is supposed to be a uniform law, meaning it's something that all states could likely pass and adopt.").

230. Uniform Act, *supra* note 224.

231. See Press Release, Hultgren Introduces Legislation to Reduce Demand for Sex Slavery, Illuminate Prostitution-Sex Trafficking Link, May 2014, available at <http://www.hultgren.house.gov>. (Congressman Hultgren advocates that the TIP Report be amended to penalize governments that "permit the purchase of commercial sex acts while simultaneously attempting to fight the spread of sex trafficking" because "these efforts are at cross purposes with each other." In Congressman Hultgren's words, "Where prostitution abounds, the sex trade abounds, the sex trade flourishes.").

232. Mark P. Lagon, "Human Trafficking: Focusing on Key Countries, Demand, and Victim Protection," Hearing on "Effective Accountability: Tier Rankings in the Fight Against Human Trafficking," 7 (Apr. 29, 2014) ("I support legislation . . . to add a provision to the TVPA minimums [sic] standards, which assesses whether national governments having it in their power to criminalize sex buying do so.").

233. Gallagher, *supra* note 111, at 384–85.

234. *Id.* ("A national government that tolerates prostitution tolerates sex trafficking they go hand in hand.")

235. Butler, *supra* note 15.

236. Under the TVPRA, prostitution only amounts to sex trafficking in cases involving (1) adults who were compelled into prostitution by force, fraud, or coercion or (2) minors, regardless of proof of force, fraud, or coercion. 22 U.S.C. §§ 7101-07 (2012).

ing the TVPRA.²³⁷ In some respects, the proposed legislation is in sync with the Department of State's use of the TIP Report to promote an "end demand" strategy to combat sex trafficking worldwide.

Still, the "end demand" campaigns an incomplete strategy for preventing child sex trafficking. The "end demand" policy focuses on prosecuting adults who purchase sex. At the same time, the "end demand" campaign obscures the need to focus on its root causes of sex trafficking such as poverty, child abuse, racial oppression and gender discrimination.²³⁸

VI. CONCLUSION

America's conflicting legal approaches to child sex trafficking undermine the credibility of a Tier 1 ranking for United States' anti-trafficking efforts. While the federal TVPRA recognizes all cases of prostitution of minors as "sex trafficking," several state laws limit the designation to the small number of cases in which force, fraud, or coercion is proven. This rule undermines the Department of State's efforts to protect minors from sex trafficking. First, the standard limits the protection of minors who are exploited for commercial sex. Second, it subverts prosecution and punishment of those who traffic minors for commercial sex. Third, the rule diminishes trafficking prevention efforts. Finally, the standard undermines efforts to develop effective partnerships with community stakeholders in the fight against domestic child sex trafficking.

Furthermore, these conflicts weaken U.S. credibility as a leader and global sheriff in the worldwide fight against human trafficking. In particular, these conflicts between federal and state law approaches to child sex trafficking undermine the United States' ability to "make the grade," *i.e.*, meet the "4P" standards set forth by the Department of State itself in its annual TIP Report.

Recognizing the TIP Report's role in establishing both national and international law and policy with respect to human trafficking, elected officials continue to lobby to change the TIP Report standards.²³⁹ Legislators must free the TIP Report from the wrangles of political debate and recognize the need to apply 4P standards in a consistent and balanced manner. Where the well-being of sexually exploited minors is at stake, this need for consistency and balance is critical. By compelling state and local governments to enact child sex trafficking legislation that conforms to and balances the 4P minimum standards, the United States can preserve the TIP Report as a "mantel of . . . protection around the bodies of the young and defenseless."²⁴⁰

237. Butler, *supra* note 15, 849–51.

238. Cheryl Nelson Butler, *A Critical Race Feminist Approach to Prostitution and Sex Trafficking*, 25 YALE J.L. & FEMINISM (forthcoming 2015).

239. See Press Release, Hultgren Introduces Legislation to Reduce Demand for Sex Slavery, Illuminate Prostitution-Sex Trafficking Link, May 2014, available at <http://www.hultgren.house.gov/newsroom/press-releases/hultgren-introduces-legislation-to-reduce-demand-for-sex-slavery-illuminate>.

240. See MAYA ANGELOU, CELEBRATIONS: RITUALS OF PEACE AND PRAYER 31 (2006).

Comments

